

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

SAFEWAY INC,)	Case No. 05-3-0038
)	
Petitioners,)	<i>(Safeway)</i>
)	
v.)	ORDER GRANTING MOTION
)	TO DISMISS
CITY OF SEATTLE,)	
)	
Respondent.)	
)	

I. BACKGROUND¹

On July 8, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Safeway, Inc. (**Petitioner** or **Safeway**). The matter was assigned Case No. 05-3-0038, and is hereafter referred to as *Safeway v. City of Seattle*. Board member Bruce Laing is the Presiding Officer for this matter. Petitioner challenges the City of Seattle's (**Respondent** or **City**) adoption of Ordinance No.121789 (the **Ordinance** or **Doc 1.4**)², which adopted interim zoning regulations and declared an emergency, as noncompliant with the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**).

On July 14, 2005, the Board issued its Notice of Hearing (**NOH**) setting a Prehearing Conference (**PHC**) date of August 11, 2005 and establishing a tentative schedule for proceedings in the case.

On August 11, 2005, the Board conducted the PHC at Room 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Bruce Laing, Presiding Officer in this matter, conducted the conference with Board member Margaret Pageler. Board extern Heather Bowman was in attendance. Darby DuComb represented Respondent City of Seattle and Roger A. Pearce represented Petitioner Safeway.

On August 12, 2005, the Board received Petitioner's Restatement of Legal Issues.

On August 15, 2005, the Board issued its Prehearing Order (**PHO**) setting forth the final schedule for this case and the legal issues to be addressed.

On September 21, 2005, the Board received City of Seattle's Motion to Dismiss with 44 attachments (**City's Motion to Dismiss**), and a Table of Attached Exhibits.

¹ See Appendix A for a more complete procedural history

² See Appendix B for text of Ordinance No. 121789.

On September 22, 2005, the Board received Petitioner's Motion to Supplement Administrative Record (**Safeway's Motion to Supplement**).

On September 23, 2005, the Board received Seattle's Revised Table of Attached Exhibits to the City's Motion to Dismiss.

On October 3, 2005, the Board received City of Seattle's Opposition to Safeway's Motion to Supplement the Record (**City's Response to Motion to Supplement**).

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On October 3, 2005, the Board received Declaration of Roger Pearce in Support of Petitioner Safeway's Response to City's Motion to Dismiss with 19 attachments (**Pearce Declaration**).

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On October 7, 2005, the Board received City of Seattle's Reply in Support of Motion to Dismiss (**Seattle's Reply on Motion to Dismiss**).

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II. PREFATORY NOTE

Safeway's legal issues are set forth in Petitioner's Restatement of Legal Issues and in the PHO as follows:

Legal Issue No. 1

Did the City of Seattle's adoption of Ordinance 121789 fail to comply with RCW 36.70A.390 by failing to provide a legally sufficient work plan justifying an interim zoning for longer than a six-month period?

Legal Issue No. 2

Did the City of Seattle's adoption of Ordinance 121789 fail to comply with the requirements of RCW 36.70A.035 and RCW 36.70A.120 because the City did not provide the public participation required by the Growth Management Act?

Legal Issue No. 3

Did the City of Seattle's adoption of Ordinance 121789 violate the requirements of RCW 43.21C (SEPA) and WAC 197-11-880 because

there was not an emergency sufficient to exempt the City's action from SEPA's requirements.?

Legal Issue No. 4

Did the City of Seattle's adoption of Ordinance 121789 violate RCW 36.70A.040 and RCW 36.70A.070 because the adoption of the pedestrian overlay zone in the ordinance was inconsistent with the City of Seattle's Comprehensive Plan policies and internally inconsistent with the City's criteria for pedestrian overlay zones?

Seattle filed a Motion to Dismiss Safeway's legal issues. And Safeway submitted a Motion to Supplement the record. The motions and responses were timely filed. The Board will first address the City's Motion to Dismiss and then Safeway's Motion to Supplement.

III. MOTION TO DISMISS

Seattle asserts that each of Petitioner's four legal issues should be dismissed and therefore the appeal should be dismissed. City's Motion to Dismiss, at 4-9. Here we address the City's challenges to the PFR in the sequence in which they are presented in the Motion to Dismiss.

A. City's Challenge to Legal Issue No. 3:

Should the Board dismiss Legal Issue No. 3 because the City Council's determination that an emergency justified the interim zoning is final and emergency interim zoning is categorically exempt from SEPA?

City's Motion to Dismiss, at 5.

Applicable Law.

RCW 36.70A.280 provides in pertinent part:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

...

In the past the Board has determined that the GMA does not confer upon the Board the authority to determine whether a city's or county's declaration of an emergency is valid. *John Wallock v. City of Everett (Wallock I)*, CPSGMHB, Final Decision and Order, Case No.96-3-0025 December 3, 1996, at 10.

In *Jack and Pamela Clark v. City of Covington (Clark)*, CPSGMHB Case No. 02-3-0005 Final Decision and Order, September 27, 2002, at 5, the Board reaffirmed the determination made in *Wallock I* that the Board does not have the authority to determine whether a city's or county's declaration of an emergency is valid.

In *Clark*, the Board stated:

Nothing in the GMA or case law has changed regarding the Board's authority to review declarations of emergencies since the Board issued its decision in *Wallock I*. Therefore, the Board declines to address this issue, as it lacks subject matter jurisdiction.

Clark, at 5

RCW 43.21C.110 provides in pertinent part:

It shall be the duty and function of the department of ecology:

(1) To adopt and amend thereafter rules of interpretation and implementation of this chapter, ... The rule-making powers authorized in this section shall include, but shall not be limited to, the following phases of interpretation and implementation of this chapter:

...

(k) Rules relating to actions which shall be exempt from the provisions of this chapter in situations of emergency.

WAC 197-11-305 provides in pertinent part:

(1) If a proposal fits within any of the provisions in Part Nine of these rules, the proposal shall be categorically exempt from threshold determination requirements...

(2) An agency is not required to document that a proposal is categorically exempt. Agencies may note on an application that a proposal is categorically exempt or place such a determination in agency files.

WAC 197-11-310 Provides in pertinent part:

(1) A threshold determination is required for any proposal which meets the definition of action and is not categorically exempt,...

WAC 197-11-880 provides:

Actions that must be undertaken immediately or within a time too short to allow full compliance with this chapter, to avoid an imminent threat to public health or safety, to prevent an imminent danger to public or private property, or to prevent an imminent threat of serious environmental degradation, shall be exempt. Agencies may specify these emergency actions in their procedures.

Board Discussion.

City of Seattle Ordinance 121789, establishing interim Zoning, includes the following finding:

Section 6. For reasons stated in Section 1, the City Council finds that an emergency exists for which it is necessary for the immediate preservation of the public peace, health and safety that this ordinance become effective without delay. By reason of the facts stated in Section 1 and the emergency that is hereby declared to exist, this ordinance shall become effective immediately upon its approval by the Mayor or passage over his veto, as provided by the Charter of the City.

Doc 1.4, at 4-5.

Section 1 of the Ordinance includes the following finding:

d. The City has been apprised of development projects in the vicinity of the Crown Hill/85th Street monorail station area that may establish vested rights and result in uses that are incompatible with desired land uses before permanent station area regulations become effective, and therefore, the City's ability to implement these City and State policies may be compromised and thwarted.

Id., at 1.

Petitioner claims there was not an emergency sufficient to exempt the City's action from SEPA's requirements. Legal Issue No. 3, PHO at 6. The Board does not have the authority to determine whether Seattle's declaration of an emergency is valid. RCW 36.70.280, *Wallock I* and *Clark, supra*. Seattle's adoption of Ordinance 121789 is an emergency action which is categorically exempt from SEPA. WAC 197-11-880, *supra*.

Conclusion.

Legal Issue No. 3 is **dismissed**.

B. City's Challenge to Legal Issue No. 2³.

Should the Board dismiss Legal Issue No. 2 because the City Council complied with the public participation requirements of the Growth Management Act for emergency interim zoning?

City's Motion to Dismiss, at 6.

Applicable Law.

RCW 36.70A.035 provides in pertinent part:

(1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:

(a) Posting the property for site-specific proposals;

(b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;

(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and

(e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

...

RCW 39.70A.390 provides in pertinent part:

A county or city governing body that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim

³ Legal Issue No. 2: Did the City of Seattle's adoption of Ordinance 121789 fail to comply with the requirements of RCW 36.70A.035 and RCW 36.70A.120 because the City did not provide the public participation required by the Growth Management Act?

zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

...

In *Vashon-Maury, et al., v. King County (Bear Creek Portion)*, CPSGMHB Case No. 95-3-0008c, Order Finding Partial Noncompliance and Partial Invalidity, (Nov. 3, 2000), the Board held:

The nature of a “moratorium, interim zoning map, interim zoning ordinance, or interim official control” is that it controls the use of land and the issuance of permits. In an emergency situation where the County wishes to prevent inappropriate vesting it would be necessary to act first to amend the land use controls (e.g., zoning map) and then have a public hearing within sixty days. To give notice of the consideration of an emergency interim control could precipitate a “rush to the permit counter” and undermine the objectives of adopting the interim control.

Bear Creek, at 8-9

In *Jody L. McVittie v. Snohomish County, (McVittie V)*, CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2001), the Board concluded:

A jurisdiction must provide notice and the opportunity for the public to participate prior to adopting any GMA development regulation or any amendment to that development regulation, unless an action is being taken pursuant to RCW 36.70A.390, in which case, notice and the opportunity for public participation may be provided after the GMA action is taken.

McVittie V, at 20

Board Discussion.

Petitioner claims the City provided no public notice prior to its consideration and adoption of the Ordinance 121789 and did not provide the public with an opportunity to review and comment on the Ordinance prior to its adoption on April 25, 2005 and thereby did not comply with the public participation requirements of RCW 36.70A.035 and RCW 36.70A.120 (sic)⁴. Legal Issue No. 2 and PFR, at 6. Under the provisions of RCW 36.70A.390 a city governing body may adopt an interim zoning ordinance without holding a public hearing prior to adoption, provided the city holds a public hearing on the adopted interim zoning ordinance within at least sixty days of its adoption. In this case the Seattle City Council adopted Ordinance 121789 without a public hearing on April 25, 2005⁵ and subsequently held a public hearing on the adopted Ordinance on June 14, 2005⁶. Petitioner participated in the public hearing⁷.

Conclusion.

The City complied with the public participation requirements of the Act pertaining to adoption of an interim zoning ordinance. Legal Issue No. 2 is **dismissed**.

C. City's Challenge to Legal Issue No. 1⁸.

Should the Board dismiss Legal Issue No. 1 because the City Council's adopted work plan justifies the 11-month interim zoning where it first requires completion of the Neighborhood Business District Strategy zoning legislation and then coordination with that new ordinance and locational criteria when preparing the permanent pedestrian overlay?

City's Motion to Dismiss, at 6.

Applicable Law.

RCW 36.70A.390 provides in pertinent part:

... A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim

⁴ RCW 36.70A.120 provides as follows: *Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.*

⁵ Doc. 1.4

⁶ Doc. 3.4

⁷ Doc. 3.8, Doc. 3.11.

⁸ Legal Issue No. 1: Did the City of Seattle's adoption of Ordinance 121789 fail to comply with RCW 36.70A.390 by failing to provide a legally sufficient work plan justifying an interim zoning for longer than a six-month period?

official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

Board Discussion.

Petitioner claims Ordinance No 121789 does not comply with RCW 36.70A.390 because it does not provide a legally sufficient work plan justifying an interim zoning for longer than a six-month period. Legal Issue No 1 and PFR at 5-6. Under the provisions of RCW 36.70A.390, an interim zoning ordinance may be effective for up to one year if a work plan is developed for related studies providing for a period longer than six months. An interim zoning ordinance may be effective for up to six months without a work plan; and interim zoning may be renewed for one or more six month periods if a public hearing is held and findings of fact are made prior to each renewal. RCW 36.70A.390, *supra*.

Section 1 of the Ordinance contains findings of fact, including the following finding:

- c. The City is currently studying proposed changes to the Pedestrian Designated Zone as part of Monorail Station Area planning and the Neighborhood Business Development Strategy at various station locations.

Doc.1.4, at 1.

Section 4 of the Ordinance provides as follows:

Section 4. The City Council directs the Department of Planning and Development (DPD) to prepare legislation to permanently add the Pedestrian District designation to the Crown Hill/85th Street, Northwest Market Street, and the Morgan and West Seattle Junction Areas, as contained in the November 2004 Station Area Planning Draft Recommendations, based upon locational criteria, as may be amended by the Neighborhood Business District Strategy legislation that will be under consideration by the City Council during 2005. The work program for this is shown in Attachment 1.

Id, at 2.

The Ordinance and attached work plan include the following directions to the Department of Planning and Development (**DPD**)⁹:

- Prepare legislation to permanently add a Pedestrian District designation to the Crown Hill/85th Street Monorail station area;
- Apply locational criteria and recognize that such criteria may be amended by the Neighborhood Business District Strategy (**NBDS**) scheduled to be considered by the Council through the 4th quarter of 2005;

⁹ See Appendix B for Ordinance No.121789 and attached work plan and schedule.

- Coordinate the preparation of the Pedestrian District legislation with the timing of the Councils review and action on the NBDS, recognizing that DPD's work may not be completed until the 1st quarter of 2006;
- Complete environmental review as required by SEPA;
- Submit periodic reports on progress under the work plan;
- The interim zoning under the Ordinance expires on April 1, 2006.

Doc 1.4

Conclusion.

The work plan and the effective time period of the Ordinance comply with the requirements of RCW 36.70A.390. Legal Issue No. 1 is **dismissed**.

D. City's Challenge to Legal Issue No. 4¹⁰.

Should the Board dismiss Legal Issue No. 4 because it is premature to perform a consistency analysis until the zoning is final?

City's Motion to Dismiss, at 6.

Applicable Law.

RCW 36.70A.040(3)(d) provides:

(3) (d) If the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994, ...

RCW 36.70A.070 provides in pertinent part:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140. ...

¹⁰ Legal Issue No. 4: Did the City of Seattle's adoption of Ordinance 121789 violate RCW 36.70A.040 and RCW 36.70A.070 because the adoption of the pedestrian overlay zone in the ordinance was inconsistent with the City of Seattle's Comprehensive Plan policies and internally inconsistent with the City's criteria for pedestrian overlay zones?

Board Discussion.

Ordinance No.121789 establishes interim zoning in order to preclude the vesting of incompatible uses before permanent station area regulations become effective. Doc 1.4, at 1. The Ordinance states that the locational criteria in such permanent regulations, including the permanent Pedestrian District zoning, must be coordinated with the Neighborhood Business District Strategy scheduled for review and action by the City Council during the effective period of the interim zoning. Doc 1.4, Attachment 1. The appropriate time for review of the Pedestrian District Zoning for consistency with comprehensive plan policies and with other development regulations is after the permanent Pedestrian District Zoning regulations have been adopted.

Conclusion.

Legal Issue No. 4 is **dismissed**.

IV. SAFEWAY'S MOTION TO SUPPLEMENT.

The Board, having dismissed all of the legal issues in the PFR, need not and will not address Safeway's Motion to Supplement.

V. ORDER

Based upon review of the Seattle's Motion to Dismiss, the GMA, SEPA, WAC 197-11, prior Orders of this Board and the other Growth Management Hearings Boards, case law, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- Legal Issues No.1, No.2, No.3 and No.4 are **dismissed**.
- Petitioner's challenge to Ordinance No. 121789 is **dismissed with prejudice**.
- The briefing schedule and hearing dates for CPSGMHB Case No. 05-3-0038, *Safeway, Inc. v. City of Seattle (Safeway)* are **cancelled**; and this matter is **closed**.

So ORDERED this 20th day of October, 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

APPENDIX A

PROCEDURAL HISTORY

On July 8, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Safeway, Inc. (**Petitioner** or **Safeway**). The matter was assigned Case No. 05-3-0038, and is hereafter referred to as *Safeway v. City of Seattle*. Board member Bruce Laing is the Presiding Officer for this matter. Petitioner challenges the City of Seattle's (**Respondent** or **City**) adoption of Ordinance No.121789, which amended certain development regulations, as noncompliant with the Growth Management Act (**GMA or Act**) and the State Environmental Policy Act (**SEPA**).

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On July 19, 2005 the Board received a Notice of Appearance and a Notice of Unavailability of Counsel from Respondent Seattle.

On August 11, 2005, the Board conducted the PHC at Room 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Bruce Laing, Presiding Officer in this matter, conducted the conference with Board member Margaret Pageler. Board extern Heather Bowman was in attendance. Darby DuComb represented Respondent City of Seattle and Roger A. Pearce represented Petitioner Safeway. The Board discussed with the parties the possibility of a settlement extension. The Board encourages such efforts and may be able to arrange for mediation or settlement assistance by members or the Eastern or Western Growth Management Hearings Boards. If the parties are pursuing settlement, with or without Board assistance, they may so stipulate in a request for a settlement extension. The Board is empowered to grant settlement extensions for a maximum of ninety days per extension.

The Board then reviewed its procedures for the hearing, including the composition and filing of the Index to the record below, core documents, exhibit lists and supplemental exhibits, dispositive motions, the legal issues to be decided, and a final schedule. Petitioner agreed to submit to the Board, with copy to the City, a restatement of legal issues by close of business Friday, August 12, 2005. The parties agreed to the Presiding Officer's request that electronic copies (in **Word** format) of the PFR, restatement of legal issues, motions and briefs be submitted to the Board Administrative Officer as e-mail attachments. This is in addition to the hard copies required by the Board's rules.

On August 12, 2005, the Board received Petitioner's Restatement of Legal Issues.

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¹¹ See Appendix B for the Legal Issues as stated in the PHO.

APPENDIX B

Ordinance No. 121789

Index to the Record Document No. 1.4